Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PUBLIC AGENCY COMPENSATION TRUST (PACT),
Petitioner

v.

COLIN PERRY ET AL.,
Respondents

On Petition For Writ Of Certiorari
To The Nevada Supreme Court

PETITION FOR WRIT OF CERTIORARI

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May 2, 2006

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QUESTION PRESENTED

Whether the conclusive presumption in NRS 617.457 violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO PROCEEDING

I. Petitioner

Public Agency Compensation Trust (PACT)

II. Respondents

Colin Perry

Employers Insurance Company of Nevada

Nevada Department of Administration Appeals Office

CORPORATE DISCLOSURE STATEMENT

Petitioner PUBLIC AGENCY COMPENSATION TRUST (hereinafter "PACT") is a Self-Insured Association which provides industrial insurance to Elko County, including the Elko County Sheriff's Department.[1]

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[1] In fact, PACT provides industrial insurance to a number of political subdivisions, including, but not limited to: the City of Carlin, the City of Caliente, Carson City, Churchill County, Douglas County, the City of Ely, Esmeralda County, Eureka County, the towns of Fernley, Gardnerville and Genoa, Humboldt County, Lander County, Lincoln County, the City of Lovelock, Lyon County, the City of Mesquite, Mineral County, Nye County, the town of Pahrump, Pershing County, Storey County, the town of Tonopah, the City of Wells, White Pine County, and the cities of Yerington and Winnemucca.

There is no parent or publicly held company owning 10% or more of the corporation's stock. Rule 29.6.

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JURISDICTION

Petitioners seek review on certiorari of an Order Denying En Banc Reconsideration entered by the Nevada Supreme Court on February 1, 2006.

Jurisdiction is based upon S.C.R. 10(c) as the Nevada Supreme Court has decided an important federal question in a way that conflicts with decisions of the United States Supreme Court. The Court also has jurisdiction pursuant to 28 U.S.C. § 1257 as it involves a Nevada state statute that is repugnant to the United States Constitution. Specifically, NRS 617.457 is in violation of the due process clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner PUBLIC AGENCY COMPENSATION TRUST (hereinafter "PACT") is a Self-Insured Association which provides industrial insurance to Elko County, Nevada, including the Elko County Sheriff's Department.[2]

Respondent COLIN PERRY (hereinafter "Perry") is a resident of Elko County and was an employee of the Elko County Sheriff's Department in the capacity of a Deputy

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[2] In fact, PACT provides industrial insurance to a number of political subdivisions, including, but not limited to: the City of Carlin, the City of Caliente, Carson City, Churchill County, Douglas County, the City of Ely, Esmeralda County, Eureka County, the towns of Fernley, Gardnerville and Genoa, Humboldt County, Lander County, Lincoln County, the City of Lovelock, Lyon County, the City of Mesquite, Mineral County, Nye County, the town of Pahrump, Pershing County, Storey County, the town of Tonopah, the City of Wells, White Pine County, and the cities of Yerington and Winnemucca.

Sheriff at all times relevant to the subject matter of the case at bar.

The Employers Insurance Company of Nevada (hereinafter "EICN") is currently a mutual insurance company providing industrial insurance to employers in the State of Nevada. At some time pertinent to the factual aspect of this case, EICN was known as the State Industrial Insurance System (hereinafter "SIIS").

Perry was a Deputy Sheriff for Elko County from 1986 to 2000. App. Vol. X 1852-54; App. Vol. IX 1704. In 1992, Perry filed a claim for coronary artery disease with Elko County. App. Vol. II 198-203. The SIIS, now EICN, was the worker's compensation carrier for the County at that time. EICN accepted his claim.

In 1998, Perry sought to reopen his coronary artery disease claim. App. Vol. II 196-197, 287. The EICN denied his request. Id. Perry appealed EICN's determination to a Hearing Officer. Id. at 189-90. The Hearing Officer affirmed the EICN's determination, concluding that the PACT was now responsible for Perry's coronary artery disease by virtue of the last injurious exposure rule. Id. Perry and the PACT appealed the Hearing Officer's decision to an Appeals Officer. App. Vol. I 181-82, 186; App. Vol. II 288-90. These appeals were assigned official numbers; namely, Appeal No. CAE-1999-C-898-TR and Appeal No. CAE-1999-E-907-TR. Id.

In 1998, Perry also filed a claim for his coronary artery disease with the PACT. App. Vol. VIII 1567 (Deposition of Dr. Owens, at Exhibit 2). The PACT denied his claim on the basis that the factual circumstances supported reopening of his coronary artery disease claim filed with EICN. App. Vol. II 193-94. Perry appealed the PACT's determination to a Hearing Officer. Id. at 191-92. The Hearing Officer reversed the PACT's determination. Id.

The PACT appealed the Hearing Officer's decision to an Appeals Officer, and an official number was assigned to the PACT's appeal; namely, Appeal No. CAE-1999-E-842-TR. App. Vol. I 7-9, 184-85; App. Vol. II 290.

By written decision entered on December 13, 2000, the Appeals Officer held the PACT responsible for Perry's coronary artery disease. App. Vol. XI 2088-2101; App. A. 1a-15a.

On January 9, 2001, the PACT filed a Petition for Judicial Review with the District Court contending, *inter alia*, that the conclusive presumption in NRS 617.457 violated the due process clause of the Fourteenth Amendment. By written decision entered on August 21, 2002, the District Court denied PACT's petition for judicial review. App. Vol. XI 2139-2150; App. B 1b-12b. On August 28, 2002, written notice of entry of the District Court's order was served by mail on PACT. App. Vol XI at 2151-52. On September 18, 2002, PACT filed its notice of appeal with the District Court. Id. at 2153-55.

On October 18, 2005, the Nevada Supreme Court entered an order affirming the District Court's denial of the petition for judicial review. App. C 1c-6c. The Petitioner thereafter filed a request for rehearing, and on December 20, 2005, the Nevada Supreme Court issued an order denying rehearing. App. D 1d-2d.

Petitioner subsequently filed a Petition for En Banc Reconsideration with the Nevada Supreme Court. App. E 1e-2e. On February 1, 2006, the Nevada Supreme Court entered an order denying en banc reconsideration. Id.

INTRODUCTION

This case involves the constitutionality of the conclusive presumption in NRS 617.457, a Nevada statute

within the Nevada Occupational Disease Act. As the Nevada Supreme Court has explained, "[t]he primary purpose of Nevada's workers' compensation laws is to provide economic assistance to persons who suffer disability or death as a result of their employment." Gallagher v. City of Las Vegas, 114 Nev. 595, 600, 959 P.2d 519, 521 (1998), emphasis added.

The conclusive presumption in NRS 617.457 eliminates the requirement of proof of a causal relation between heart disease and the occupations of policemen and firemen. Indeed, the presumption created by NRS 617.457(1) being a conclusive one, and hence not rebuttable by proof of the actual facts, requires an adjudication that a perfectly healthy off-duty policeman (and even a retired policeman), who may bring on a heart attack by overexertion working at home or on the last day of a lengthy out-of-state vacation, suffered the attack in the course of his employment, in the line of duty, and within the scope of his employment, despite the circumstance that the situation is entirely without foundation in fact. See Ducharme v. City of Putnam, 285 A.2d 318 (Conn. 1971); NRS 617.457(1). Tthe PACT respectfully submits that NRS 617.457 creates a conclusive presumption in violation of the Due Process Clause. In addition, this appeal has enormous public policy implications as recent actuarial reports have determined that the conclusive presumption of work related heart disease will create an estimated $2.8 billion dollars in unfunded workers compensation liability over the next three decades.

The conclusive presumption in NRS 617.457 constitutes an attempt, by legislative fiat, to enact into existence a fact which does not, and cannot be made to, exist

in actuality.[3] Ducharme v. City of Putnam, 285 A.2d at 321-22. The power to create presumptions is not a means of escape from constitutional restrictions Id. It is not without significance that although many states have recognized the special situation of firemen and policemen, and the problems of proving a causal relationship between their employment and heart ailments and have provided special treatment for them in the nature of rebuttable presumptions, **as to causation, no other state appears to have successfully attempted by legislative fiat and conclusive presumption to bar the insurer from attempting to prove the negative fact that in a contested worker's compensation case the heart ailment was not causally connected with the employment.** Ducharme v. City of Putnam, 285 A.2d at 322.

The PACT believes this Court is constrained to hold that the conclusive presumption prescribed by NRS 617.457(1) in the adjudication of workmen's compensation cases is in contravention of the due process clause of the United States Constitution.

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[3] There is no consensus in the medical or scientific community that employment as a police officer or fireman causes heart disease. Hence, it is patently irrational to conclusively presume that any heart disease suffered by a policeman or fireman during his lifetime is job-incurred, if the heart disease manifests itself anytime after 5 years of continuous work in that occupation. See, PACT Reply Brief at pp.12-16; Vol IX, Appellant's Appendix at 1160-1703. See App. C at 3c.

LEGAL ARGUMENT

A. The United States Supreme Court Has Found Statutes Creating Conclusive or Irrebuttable Presumptions Invalid and Violative of Due Process.

Several cases heard by the Supreme Court of the United States demonstrate how conclusive presumptions enacted in other states have been found to violate the due process clause of the Fourteenth Amendment.[4] One example is Vlandis v. Kline, which involved a Connecticut statute regarding residency status in determining tuition rates for the state university system. 412 US 441, 93 S. Ct. 2230 (1973). Under the Connecticut statute, for tuition purposes, the status of the student as a nonresident at the time of application for admission was conclusively presumed to continue for the entire period of attendance. Id. This created a due process issue because nonresident students were required to pay higher tuition in order to attend the state university, and they were not afforded the opportunity to present evidence of residency.

The conclusive presumption of the statute was challenged by students who had become a bona fide residents of the state, yet they were still considered nonresidents for tuition purposes because they were not residents at the time they applied to the university system. Id. The state argued

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[4] The right of due process is a federal right. Therefore, whether legislation violates due process must be analyzed under the principles articulated and applied by the Unites States Supreme Court. The Nevada Supreme tacitly acknowledged the foregoing point when it cited in support of its order of affirmance Allen v. State Pub. Emp. Ret. Bd., 100 Nev. 130, 676 P.2d 792 (1984).

that this conclusive or irrebuttable presumption was necessary because they had a valid interest in equalizing costs for bona fide residents who subsidize the state university system, and that the state can reasonably offer lower rates only to its established residents whose past tax contributions to the state have been higher. The other reasoning offered by the State was that it offers administrative certainty and simplifies what would be an expensive administrative burden of evaluating when bona fide residency exists. Id. at 451, 2236.

The Court noted that, "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments." Id. At 446, 93 S. Ct. At 2233. The Court went on to hold that "it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." Id at 452, 93 S. Ct. at 2236.

Another case where the Supreme Court found that an irrebuttable presumption violated the Due Process Clause involved a school board policy which required pregnant female teachers to terminate employment at least five months before their due date. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S. Ct. 791. (1973). There was no individualized determination by the teacher's doctor, or the school board, as to a particular teacher's ability to continue at her job. The Court found that the policy amounted to a conclusive presumption that every pregnant teacher who reached a certain date of pregnancy is physically incapable of continuing employment, even when the medical evidence as to an individual woman's physical status might be wholly to

the contrary. Id. at 644. It was evident to the Court that the ability of any particular pregnant woman to continue to work past any fixed time is very much an individual matter, thus the conclusive presumption embodied in the policy was neither necessarily nor universally true, and violated the Due Process Clause. Id.

The Court also addressed the school board's argument that the mandatory termination date serves the state's interest of administrative convenience in keeping physically unfit teachers out of the classroom. The Court held that "[w]hile it might be easier for the school board to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." Id.

The Supreme Court has used the same principles and analysis in finding other laws containing irrebuttable presumptions to violate due process rights. An irrebuttable presumption under an Illinois law that unmarried fathers are unsuitable and neglectful parents was found to violate due process because parental unfitness must be established on the basis of individualized proof. Stanley v. Illinois, 405 U.S. 645, 92. S. Ct. 1208 (1972). Despite the state's interest in protecting children from neglectful parents, the means used to achieve this interest must still be constitutionally defensible. Id. at 652, 1213. In another Supreme Court decision, a "tax dependent" provision of the Food Stamp Act that rested on an irrebuttable presumption often contrary to fact was invalid for lacking critical ingredients of due process. United States Dep't of Agric. v. Murry, 413 U.S 508, 93 S. Ct. 2832 (1973). See also, Turner v. Dep't of Employment Sec., 423 U.S. 44, 96 S. Ct. 249 (1975),

(presumption that pregnant women are incapable of working after six months of pregnancy.)

Just like the statutes in the aforementioned Supreme Court cases, NRS 617.457 creates an irrebuttable presumption that all heart disease suffered by police officers is a result of their employment. The effect of that irrebuttable presumption is that it provides no opportunity to Insurers and Employers who are required to provide workers' compensation coverage to demonstrate that the heart disease is not work related.

As the cases illustrate, an irrebuttable or conclusive presumption should be based upon a presumption that is necessarily or universally true in fact. The Nevada Supreme Court has supported this view and described the constitutional burden as to a conclusive presumption as requiring "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Edwards v. Sheriff, Clark County, 93 Nev. 13, 15, 558 P.2d 1144 (1977). Just as it is not necessarily or universally true in fact that all women who are 4 months pregnant are unable to work, that out of state college students never become bona fide residents, or that all unmarried fathers are unfit parents, it is not necessarily or universally true in fact that all heart disease suffered by police officers during their lifetime is the result of their occupation, if the disease manifests itself anytime after 5 years of continuous work in that occupation. Due process requires that each case be considered on an individual basis.

Furthermore, the Supreme Court stresses that administrative ease and legitimate state interests cannot save a conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means to achieve the State's goals. While Nevada may have a legitimate interest in ensuring that police

officers receive workers' compensation benefits, encouraging police officers to remain in public service, and in making the administrative process for such claims more efficient, the means used by the State in furtherance of those interests have subverted the due process rights of the insurers and employers who are required to pay for the workers' compensation claims. By relieving police officers of the burden of proving the causal connection between their heart disease and their employment, the legislature has effectively stripped the insurers and employers of the opportunity to challenge a heart disease claim that is totally unrelated to employment. Just as the United States Supreme Court has expressed, when there are reasonable alternative means to promote the State's interest without violating due process, those means must be employed.

If the State of Nevada has an interest in making an outright gift or special benefit to police officers and firemen, it must do so outside the Nevada Industrial Insurance Act and Nevada Occupational Disease Act. See, Ducharme the City of Putnam 285 A. 2d at 322-23. Such a special benefit or gift type legislation is not present before this Court for consideration. The PACT respectfully submits that regardless of what the Nevada Legislature might have constitutionally done to provide police officers and firemen a heart disease benefit, the legislature did not do so in enacting NRS 617.457(1). A special gift or benefit cannot come under the guise of workers' compensation benefits and at the expense of the insurers and employers who must pay for those benefits. Doing so has violated the due process rights of those insurers and employers.

Finally, as previously expressed by the United States Supreme Court in Tot v. United States, 319 U.S. 463 (1943), a presumption cannot be prescribed solely because it is very difficult for the opposing counsel to prove his case. *Id. at*

467-69. A fortiori, the foregoing is true with respect to statutory conclusive presumptions, Ducharme v. City of Putnam, 285 A.2d 318, 321-22 (Conn. 1971).[5]

B. The Usery Case Demonstrates that the Five Year Rule is Completely Arbitrary

In the Usery case, there was a consensus that pneumoconiosis was causally related to the occupation of coal mining, through inhalation of coal dust. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 26-28 (1976). It was this foundational fact that permitted congress to enact a rebuttable presumption based upon years of employment. Id. In turn, the congressional record contained medical evidence indicating the noticeable incidence of pneumoconiosis in cases of miners with ten (10) years employment in the mines. Id. Therefore, the court could not say it was "purely arbitrary" for congress to select the 10 year figure as a point of reference for the rebuttable presumptions at issue in that case. Id.

In contrast to the Usery case, there is no similar medical consensus on employment as a police officer or fireman and the causation of heart disease. Hence, it was improper for the legislature to even establish a duration of employment rule as a premise for the conclusive presumption at issue in this case.

Furthermore, the specific legislative history upon which the Nevada Legislature premised its determination to

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[5] As a result, the PACT respectfully submits that the hypothesis that the Nevada Legislature may have enacted NRS 617.457 "to eliminate costly battles of the experts used to prove or disprove a causal connection between firefighting and police work and heart disease," cannot survive the due process challenge pressed by PACT in this case. App. C at 4c.

enact the conclusive presumption in NRS 617.457 is part of the record on appeal. See, Vol IX, Appellant's Appendix at 1160-1703. The "stuff of actual experience" amassed in this legislative history was essentially two (2) appeals officer decisions filed respectively on March 21, 1989 and August 12, 1987. Id. In this legislative history, there is no medical evidence indicating that 5 years' employment as a police officer fireman is associated with a notable incidence of heart disease. Id. For this reason, the 5 year employment rule is "purely arbitrary." Moreover, the 1987 Appeals Officers decision is scholarly and clearly proves or shows that it was irrational for the Nevada Legislature in 1989 to have concluded that after 5 years of work as police officer fireman, any heart disease that a policeman or fireman has in his entire life arose out of and in the course of his employment as a policeman or fireman. See, PACT Reply Brief at pp.12-16.

C. The Implications of NRS 617.457 Demonstrate the Lack of Due Process

Following the administrative trial of this matter, new information arose that demonstrated the effect NRS 617.457 will have on the State of Nevada. On July 31, 2005, an article appeared in the Las Vegas Review Journal which discussed NRS 617.457. See, PACT's Petition for En Banc Reconsideration. The subject of the article was the effect that NRS 617.457 and the corresponding lung and hepatitis statutes will have on the local governments who must provide workers' compensation benefits for public safety workers. Until recently, the financial impact of these statutes was unknown.

The article discussed actuarial reports which examined the outstanding benefit costs that would be incurred for public safety worker heart disease, lung disease

and hepatitis claims. Id. The reports were prepared for various Nevada cities and entities that would be effected by such claims. Id. The actuarial reports were completed for the Cities of Las Vegas, North Las Vegas, Henderson, Reno, Sparks, and the Las Vegas Metropolitan Police Department. Of significance, the article pointed out that the actuarial report completed for the City of Las Vegas found that the city faced at least $791 million of claims-related expenses as a result of the conclusive presumption created by the heart, lung, and hepatitis statutes. The combined cost for all of the entities who participated in the study was estimated at $2.8 billion over the next three decades, which the reports identified as a conservative estimate. Id.

The factual information contained within the article and the reports raises significant public policy issues for the State of Nevada. By creating a conclusive presumption that all heart disease suffered by police officers is work related, the Legislature has created an unfunded liability the local governments and their insurers must bear to the tune of hundreds of millions of dollars.

This unfunded mandate is contrary to the public policy of the State of Nevada. A statutory provision added in 1999 specifically requires legislative measures that will cost local governments in excess of $5,000 to indicate that the measure contains an unfunded mandate, and whether the measure was requested by the local governments who will bear the costs. NRS 218.2479. The clear intent of this statute is to avoid sticking local governments with unfunded mandates unless the local governments are the ones requesting the increase in programs or services.

The fiscal impact of NRS 617.457 is only now being revealed to counties, cities, and insurers who will bear the cost. The statute constitutes an unfunded mandate which the local governments of Nevada never requested, and one which

the local governments of Nevada cannot afford. The statute's violation of due process will ultimately have serious public policy implications for the State of Nevada.

CONCLUSION

In accordance with the foregoing, Petitioner respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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